SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 312

DE BARDELEBEN COAL COMPANY, INC.,
Petitioner,

vs.

MRS. LOLA MACOMBER, ADMINISTRATRIX OF THE ESTATE OF JOHN B. MACOMBER.

BRIEF IN SUPPORT OF FOREGOING WRIT OF CERTIORARI.

The decree of the Court of Appeals for the Parish of Orleans is found at R. 95 and is not yet reported.

The decree of the Supreme Court, dated April 27, 1942, is shown at R. 123 and is reported in 8 So. (2d) 624.

The jurisdiction of this case is based upon U. S. C. A. Title 28, Section 344 B.

Dates of Decree and of Denial of Petition for Rehearing in the Supreme Court of Louisiana.

The date of the decree to bereviewed is April 27, 1942 (R. 123).

The petition for rehearing duly filed was denied on May 25, 1942 ((R. 135).

Statement of Case.

For brevity, we adopt the statement made in the beginning of this petition. Whatever other evidence may be appropriate we will add under the points presented to which it may be specially pertinent.

Specification of Errors.

1. The Court erred in holding that there was any evidence of negligence whatsoever on the part of Edgecomble, the deckhand, in not throwing a life-preserver, upon which a judgment could be rendered in favor of the plaintiff.

2. The Court erred in holding that there was any evidence showing that the failure to throw a life-preserver in any way contributed to the death of Macomber and that, as a matter of law, there should be a judgment or verdict for the defendant.

3. The Court erred in applying the law to the evidence in such a way as to hold that a jury could speculate as to whether a life-preserver could have saved the deceased.

4. The Court erred in holding that there was sufficient evidence upon which to base a judgment that the failure to throw a life-preserver was the proximate cause of the accident.

MAY IT PLEASE THE COURT:

It is very important that this Honorable Court take jurisdiction over this case, for the reason that the Supreme Court of La. has definitely, in the case at bar and in the case of *Fegan* v. *Lykes Bros. S. S. Co.*, 3 So. (2d) 632, enunciated doctrines of law contrary to the general rule of law as set forth in the Federal Courts, under the Jones Act, and has allowed recoveries in cases where a directed verdict, as a

matter of law, would have been granted in favor of the defendant.

This Honorable Court said in the case of *Erie* v. *Tompkins*, 58 S. Ct. 817, 304 U. S. 364, that it was essential that the law of the Federal Courts, in matters where jurisdiction was conferred on the Federal Court by diversitive citizenship, should not be different from the law of the State. The Court said:

> "On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift *v.* Tyson introduced grave discrimination by non citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.
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> "The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, 'general law' was held to include the obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions

construing local deeds, mineral conveyances, and even devises of real estate, were disregarded.

"In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the Taxicab Case.

"The injustice and confusion incident to the doctrine of Swift v. Tyson have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."

It is respectfully submitted that the same logical and equitable reasons apply to the case at bar. Under the Jones' Act the plaintiff was given the right to select his forum and if the law as administered by the State Court under a United States Statute is going to be different from the law as administered in the Federal Court, the same injustice and discrimination will occur as was occurring under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865. In view of the fact that the plaintiff has the right to select a forum and in view of the fact that this action arises under a law of the United States, and further, in view of the fact that it involves questions of interstate commerce and admiralty, the law should be uniform and a plaintiff should not be able to recover in a State Court when he could not recover in the Federal Court. It is upon this basis and this basis alone that this Honorable Court is

asked to take jurisdiction of this case. A reading of the testimony will definitely show that this case would have never gone to the jury either on the question of negligence or on the question of whether, if there was negligence, the negligence was the proximate cause of the death, in a Federal court.

It is most important that this Court take jurisdiction, because the decision is definitely contrary to the decision in the case of *New York Central Railroad Co.* v. *Grimstad,* 264 Fed. 334. Furthermore, it is contrary to the decisions of *Harris* v. *Pennsylvania Railroad Co.,* 50 F. (2d) 866 and *Kirincich* v. *Standard Dredging Company,* 112 F. (2d) 163. It is contrary to the general and accepted common law of negligence and proximate cause and to all of the cases decided by the Federal Courts under the Federal Employers' Liability Acts.

Furthermore, this Honorable Court has held over and over again that it would take jurisdiction where the question involved was whether there was any substantial evidence of negligence upon which a judgment could be based. *Union Pacific R. Co.* v. *Huxoll,* 245 U. S. 535; 38 S. Ct. 187; *N. O. and N. E. R. Railroad Co.* v. *Harris,* 247 U. S. 367; 38 S. Ct. 535. This Court has also held that questions, arising under the General Admiralty Law and involving the question of whether there is sufficient evidence upon which to base a judgment under said General Admiralty Law, will be reviewed and are Federal questions. *Cornell Steamboat Co.* v. *Phoenix Construction Co.,* 34 S. Ct. 701; 233 U. S. 593.

In the case of *Gulf M. & N. R. Co.* v. *Wells,* 48 S. Ct. 151; 275 U. S. 455, the Court said: (Page 52)

> "It is unquestioned that Wells was at the time employed in interstate commerce, and that the case is controlled by the federal Employers' Liability Act. Hence, if it appears from the record that under the

> applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient, in kind or amount, to warrant a finding that the negligence of the engineer was the cause of the injury, the judgment must be reversed. Seaboard Air Line v. Padgett, 236 U. S. 668, 673, 35 S. Ct. 481, 59 L. Ed. 777; Chicago, M. & P. Railroad v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041."

Another case to the same effect is *Chicago & Great Western R. Co.* v. *Rambo,* 56 S. Ct. 693; 298 U. S. 99, wherein the Court held:

> "On certiorari to review State Supreme Court's judgment, affirming judgment on jury's verdict for plaintiff in death action as supported by sufficient evidence of defendant's negligence, Federal Supreme Court must examine record and determine for itself whether as a matter of law there is enough evidence to sustain finding of negligence." (Federal Employers' Act, 45 U. S. C. A. Sec. 51-59.)

Before discussing the testimony, we wish to again call the Court's attention to the fact that the majority opinion of the Court of Appeals for the Parish of Orleans specifically stated that:

> "In our opinion this case, if it had been tried in the Federal Court, would not have gone to the jury but would have been disposed of by a directed verdict pursuant to the procedure prevailing in that court." (R. 101-102).

Attention is also called to the fact that Chief Justice O'Neill dissented from the majority opinion of the Supreme Court of Louisiana.

The testimony of Edgecombe (R. 19) in this case as to what happened is as follows:

> Q. What was Macomber doing at the time that this accident happened?

A. He was coming down from swooging the smokestack, coming down the ladder.

Q. What do you mean by swooging?

A. You take soap and water or sal soda and water and wet a piece of waste and scrub the stack until the white shows up and then you swab it up with clear water, same procedure, and wipe the swoogy off, which leaves you a clean surface.

Q. You say he was coming down the ladder?

A. Yes, sir.

Q. Where was this ladder situated on the boat?

A. The top of it was leaning against the smokestack and the bottom of it on top of the engine room hatch, or it was leading from the smokestack to the deck, it was situated right alongside.

Q. You say he was coming down the ladder?

A. Yes, sir.

Q. What happened?

A. To the best of my knowledge the man was coming down and as he was coming down he put his foot through one of the rungs of the ladder, and he had one hand, his left hand I would say, on the stay to hold himself coming down, because I was at the bottom of the ladder to keep it from falling, and he put his foot through the rung of the ladder and for some unknown cause, I don't know what, he fell and hit the deck on his buttocks.

Q. Did the ladder fall?

A. No, not until after I turned it loose to grab him after he fell.

Q. In other words you held on to the ladder until he hit the deck?

A. Yes, sir.

Q. About how far was this stay which was leading from the deck to the smokestack, away from the ladder?

A. I would say not far, in fact we used it to come up and down the ladder, used it as a guide rail like you have alongside of a ladder.

Q. Will you state whether or not there was any jar or motion of the vessel that happened at that time when he put his foot through the rungs of the ladder?

A. No, it was running just as smooth as anything, just like glass, no rough seas or anything like that at all.

Q. What kind of a ladder was this?

A. It was a regular ladder, it had rungs in it, it was just a regular ladder, you know.

Q. About how tall was it?

A. I don't know exactly, it was high enough to reach up the smokestack, I would say it was about as high as that book case over there; (referring to bookcase in room where the testimony was being taken) about ten feet.

Q. How high was he washing on the smokestack from the deck?

A. I don't know, I couldn't give you the exact measurement, I am a very poor — at measuring to tell you the truth.

Q. What kind of a vessel is the Clara?

A. It has been engaged in towing cargo barges, and it also carries cargo in its hold between Houston and New Orleans in the freight business.

Q. Was the ladder resting on the deck or on the engine room hatch?

A. It was resting on the engine room hatch.

Q. How far is this hatch from the deck, how high?

A. I would say about so high (witness indicating) about two feet.

Q. At the time he was coming down the ladder and put his foot through the rungs of the ladder, did the ladder slip or move?

A. No, I had a very good secure hold on the ladder.

Q. How did you all happen to be swoogying the smokestack?

A. I will tell you, to begin the story Macomber and I had been ship mates for a long time since he came over, and we were sitting down talking when he came on watch at noon, and we were looking at the stack and he said "damn it is dirty" and I said "yes it sure looks dirty" and he said "what do you say we clean it, we swoogy it" and I said "the Skipper didn't tell

us, but we don't have to wait'' so we decided to go ahead and clean it.

Q. Who selected the ladder to use?

A. We both took it out at the same time, we carried it together, both of us.

Q. Was the ladder in good shape and condition or in bad condition?

A. It was in good shape, because I don't believe in using anything that will get somebody hurt.

Q. How about the railing of the vessel?

A. It was in A-1 condition as far as I know, clean, no defects or anything like that, in A-1 condition.

Q. How did he go overboard after he fell off the ladder?

A. He hit on his buttocks and he went through the railing and hit the water. My first thought was that the wheel would hit him and I called out to the wheelhouse there was a man overboard, and we proceeded at once to lower the life boat and go after him.

Q. What was done after you yelled ''man overboard''?

A. Of course the man on watch which was A. A. Smith, at the time, pilot, he ordered the life boat overboard at once, and I proceeded to take the cover off and the rest of the crew helped to put it overboard, and we went back to the spot to watch the spot and pulled around there, and after we didn't find him we called to a fisherman to come over and see what he could do, and he went back and got some hooks on a line, there were about 600 hooks if I am not mistaken, and we suggested to put it across the channel where we thought, approximately, where he was, and we dragged for him.

Q. What was done with the engines at the time you yelled ''man overboard''?

A. They were stopped and put full astern to the best of my knowledge, of course I was not in the wheelhouse, but knowing boats like I do——

Objection: Mr. Dowling: I object to your testifying to anything except what you know.

A. —the engine was put full astern.

Q. Was there any life ring on the boat?
A. Yes sir.
Q. Did you throw it out to him?
A. No, I didn't throw it to him because he didn't come up, and another thing I wanted to get the engines stopped as quickly as possible so the wheel wouldn't hit.

Mr. Wuertz, the engineer, was of the same opinion. He said that the wind was blowing broadside of the boat. (R. 73);

A. Well, what I heard the way things went, he fell just along side of the boat. He is supposed to fall off the ladder and hit the deck of the boat and fell right alongside the boat. Well, that was pretty close to the churn of the wheel. I imagine if I had done it myself, I would have to try to stop the engine before I even thought of a life ring because he was in water shallow enough and as quick as he could have got the life ring after he got out from the churn of the wheel, it would not have done him any good.

Captain Smith, the pilot, who holds a Master's License for Lakes, Bays and Sounds and the Great Lakes, and who has been on boats for twelve years, testified as follows (R. 77):

A. No, it was not thrown overboard. In other words there was only one man on watch, Edgecombe, and that man was holding the ladder, and when he fell overboard, if that man had thrown that life preserver overboard, the space between that life preserver and where he was standing and him going to it and getting it and throwing it overboard the man couldn't have reached it anyhow, if he could have stayed on top of the water.
Q. About how fast was the Clara going at that time?
A. Between seven and nine miles an hour.

The attorney for the appellee made much of Macomber's being seen on top of the water. As a matter of fact, it is

clear from the testimony of Angelo and Smith that the man was on top of the water for a very few seconds at the most. Smith says (R. 76):

> A. I would say approximately, it takes a man to stay on top of the water from 25 feet to 50 feet so I couldn't say positively just how long.
> Q. By that you mean, in other words he swam——
> A. He swam approximately 25 feet.
> Q. How wide is that canal at that point?
> A. I wouldn't give it over 80 feet.
> Q How far was he from shore?
> A About 25 or 50 feet.

The testimony of the master of the vessel, Captain Angelo, was as follows (R. 54):

> Q. How far would he have had to swim to reach shallow water from where you saw him?
> A. About 35 or 40 feet.
> Q. Will you state whether or not there were any beacons he could have swum to?
> A. Yes, sir. They had beacons out there. Beacon 32 is where he fell overboard. He could have swum there and grabbed onto this beacon.
> Q. How far was that from where he went overboard?
> A. The beacon is on the edge of the channel and the channel there is 100 feet wide, and we were coming down the center of the channel and the boat is 21 feet wide itself.
> Q. That is 30 or 40 feet at the most he would have to swim?
> A. At the most, yes sir.

At R. 60 he said that it was too late to throw a life ring and then he said:

> A. You haven't time. By the time we check the boat we couldn't throw a life ring that far. Even when the man first went overboard it would not do any good unless he could throw it around his neck.

Q. How far can you throw a life ring—the average man?

A. I would say about 35 feet, something like that, the furtherest I can throw.

Again on Page 61:

A. "Cap.", my opinion of the thing, I am telling you what I know, what I know about life rings; I am telling you it wouldn't have saved the boy, if you had seven dozen life rings.

Again on Page 61, he said:

A. In one way it would and in another way you look at it, it would not have done the boy any good.

Q. Life rings are put on these boats to save people?

A. I don't think this boy knew how to swim.

Q. But he was still struggling 300 feet away?

A. Yes.

Q. What was the distance of the nearest life ring to where Edgecombe was?

A. About 7 or 8 feet. You see by the time the boy grabbed for this boy to try to save him where he went over the side, it took a couple of minutes to get the life ring off the rail and get it over to him and by that time the boat would have been a good distance away. When you fall overboard from the stern of a boat, you stay down there a little while before you come up with that suction.

These were the only four witnesses that testified in the case. The testimony also shows that Macomber had a pair of heavy army shoes on (R. 77) and it is to be noted that Captain Angelo says that he could not swim.

Let us compare this case with the leading Federal Court case to show how much in conflict it is. In the case of *New York Central Railroad Company* v. *Grimstad*, 264 Fed. 334, there was an absence of life preservers. The Court held that there should have been a judgment as a matter of law

unless there was testimony showing that the lack of a life preserver would have saved the deceased. The Court said:

> "Obviously the proximate cause of the decedent's death was his falling into the water, and in the absence of any testimony whatever on the point, we will assume that this happened without negligence on his part or on the part of the defendant. On the second question, whether a life buoy would have saved the decedent from drowning, we think the jury were left to pure conjecture and speculation. A jury might well conclude that a light near an open hatch or a rail on the side of a vessel's deck would have prevented a person's falling into the hatch or into the water, in the dark. But there is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, that is, sooner than she got the small line, or if she had, that she would have thrown it so that her husband could have seized it, or, if she did, that he would have seized it, or that, if he did, it would have prevented him from drowning."

Clearly the decision of the Supreme Court of Louisiana is in conflict with the doctrine.

The decision is also in conflict with the case of *Harris* v. *Pennsylvania Railroad Co.*, 50 F. (2d) 866. In that case the court below directed a verdict for the defendant. The Court of Appeals decided that there was sufficient evidence to go to the jury, but let us examine the facts.

> "We think also that the evidence was sufficient to justify the submission to the Jury of the issue of negligence. The Jury might well have concluded that a greater degree of diligence should have been exercised by the mate in charge of the vessel and by the fireman on the deck at the time. The deceased was an expert swimmer, and, when he came to the surface of the water, he was swimming or treading water. He called out several times for the men on the barge to throw

him a line. At this moment or shortly thereafter, the mate arrived at the side of the ship in close proximity to a life ring, but made no effort to throw it into the water because he could not see the man overboard. The mate knew that the man had just gone overboard, and it should have been obvious to him that the very occasion existed for which life rings are made and used. The fireman also, although making an effort in his excitement to throw overboard a 6-inch hawser which one man could not readily handle, failed to make any effort to use the heaving line nearby which he could easily have managed. It is true that the heaving line was only about 50 feet long and when the hawser was thrown, Harris was already 50 feet from the stern of the vessel which was then slowly going ahead. But it is not easy to understand, notwithstanding the testimony of Sparrow to the contrary, why he could not have reached the stern of the vessel before it passed the man in the water. The vessel was only moving at the pace of an ordinary pedestrian, and an able-bodied seaman should have had no difficulty in reaching the stern before the vessel passed the man struggling in the water. The Jury was not obliged to accept his opinion that he went aft as soon or as fast as he could.

"These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the Jury to decide whether the man could have been saved if due diligence had been used. The deceased, even when last seen, was within 200 feet of the point at which a life ring, if promptly thrown, would have rested on the surface of the water. He was evidently making every possible effort to save himself. Whether in any event he would have succeeded is not a certainty, but in our view there was enough testimony tending to show a reasonable probability of rescue, had a life ring or heaving line been used, to justify the submission of the question to the Jury."

Compare these facts to the facts in our case. In the *Harris* case, Harris was an expert swimmer. In the

Macomber case, the only evidence is that he was not. In the *Harris* case, the deceased called out for the deckhand to throw him a line. Nothing like that happened in the *Macomber* case. The mate, in the *Harris* case, knew the man had gone overboard and it should have been obvious to him that this was the occasion for which life preservers existed. The decedent was treading water within fifty feet from the stern of the vessel, which was moving at the pace of an ordinary pedestrian. In the *Macomber* case, before the mate of the vessel knew about it, the deceased was some three hundred yards to one-half of a mile from the stern of the vessel. The vessel was moving between seven and nine miles an hour. In the *Harris* case, the fireman had an opportunity to throw over a 6-inch hawser. The deceased, when last seen, was within two hundred feet from the point where a life ring, if promptly thrown, would have rested on the water. The vessel was in the harbor. The fireman picked up a hawser instead of a heaving line and threw it into the water. The court in this case said that it could be distinguished from the *Grimstad* case (*supra*) because there was sufficient evidence to go to the jury under these facts, but in the *Macomber* case, the evidence, instead of pointing to the probability of rescue, all pointed away from the probability of rescue. Edgecombe had only a moment to make up his mind as to what to do. The Chief Engineer testified that he would have done the same thing that Edgecombe did.

Now if we compare the facts of this case to the *Kirincich* case, 112 (F. (2d) 163, we again find that the decision is in direct conflict. In the *Kirincich* case, the court definitely laid down the rule of law that there must be proximate cause. We quote from the case:

> "The variable evidence raises an issue only dimly sensed by counsel. We say only dimly because we gather it from their citations rather than from their

argument. Before we reach the complexities of 'proximate cause', we encounter the requirement of causation in its logical sense. This requirement finds one expression in the 'But-for' or 'Would have happened anyway' rule. Professor Beale phrases it in this wise: 'Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words did not cause it.' Beale, The Proximate Consequences of an Act, 33 Harvard Law Review, 633, 637. See, also, Smith, Legal Cause in Actions of Tort, 25 Harvard Law Review 103, 109; McLaughlin, Proximate cause, 39 Harvard Law Review 149, 153, 154; Hirschberg, The Proximate Cause in the Legal Doctrine of the United States and Germany, 2 Southern California Law Review 207, 211, 212, 217; cf. vs. Liszt-Schmidt Lehrbuch des Strafrechts; Max Ludwig Mueller, Die Bedeutung des Kausalzusammenhanges.

"The stock illustrations of the writer are: the child running in front of the horses whose reins were carelessly out of the driver's hands, Regina *v.* Dalloway, 2 Cox C. C. 273; and the runaway horses going through an obligatory fence not strong enough to stop them anyway, Sowles *vs.* Moore, 65 Vt. 322, 26 A. 629, 21 L. R. A. 723. Nearer to our own facts, Professor Beale cites a case where the mate fell from the defendant's vessel, never arose to the surface and the ship's boat was negligently lashed to the deck, Ford *v.* Trident Fisheries Co., 232 Mass. 400, 122 N. E. 389 * * *."

What were the facts of the *Kirincich* case? Quoting from the court:

"As the tow slowed up in the calm water between the piers, cries for help were heard and the seaman was seen to be in the water twenty yards from the end of the derrick barge. At this cry deckhands threw heaving lines and repeated their casts three times and came

> once within two feet of the spot where he was struggling."

In that case, the proof was definitely to the effect that the deceased would have been saved if a life preserver had been thrown, because, with the seaman crying for help and with a heaving line coming within two feet, a life preserver would have saved him. On the basis of this case, a directed verdict would have been rendered for the defendant in the *Macomber* case.

Other cases which are contrary to the decision of the Supreme Court are *Russell* v. *Merchants & Miners Transportation Co.*, 19 Fed. Supp. 349, and *Martin* v. *Lower Coast Construction Company*, 16 F. (2d) 835, cited by the Court of Appeals for the Fifth Circuit.

In the latter case, the superintendent of a quarter boat fell overboard as the boat was being towed to a new location. The boat had no search-light on it and the accident happened at night. There were no railings at the ends or sides of the quarter boat. The court said:

> "It is far from certain that Martin was alive when the search for him was begun; but, if he was still above the surface of the water, it is consistent with the testimony that he was out of reach of assistance, as the tug and tow were proceeding up the river and a swift current was carrying him down stream."

The Supreme Court of Louisiana lays great stress upon the current carrying the life preserver to him and overlooks the fact that if the current was swift enough to carry a life preserver to Macomber, it was also strong enough to carry him away from the tug. The court goes on to say:

> "It is mere conjecture to say that, if a search-light had been used, Martin's position in the river would have been located, or, if it had been, that he could have been saved from drowning."

The case of *Young* v. *N. O. Coal & Bisso Towing Company,* 8 F. (2d) 310, and *The America,* 35 F. (2d) 413, both hold that the failure to use equipment does not make the owner of the vessel liable unless there is a fair preponderance of credible evidence showing that it could have been used successfully.

The decision is also clearly contrary, insofar as proximate cause is concerned, to the cases decided under the Federal Employers' Liability Act. For instance, this Honorable Court has said in the case of *Atchison T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351, 74 L. Ed. 896, 50 S. Ct. 281:

> "The proof of negligence alone does not entitle the plaintiff to recovery under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employee."

The Federal Courts have consistently held that recovery for the wrongful death of an employee cannot be based upon pure surmise or mere guess. *Colonna* v. *Merchants and Miners Transp. Co.,* 112 F. (2d) 612.

To the same effect are the cases of *Black Gull,* 82 F. (2d) 758; *Field* v. *Waterman S. S. Corp.,* 104 F. (2d) 849.

To show how much speculation there was in this case, the Supreme Court of Louisiana suggested that if a life preserver had been thrown, it would have floated back to the deceased. The evidence shows that there was a current running toward the deceased, but it is to be remembered that this current would also take the man away from the vessel and the life preserver. The testimony shows that there was a strong wind blowing across the channel. There

is no way to prove that this life preserver, under the circumstances in this case, would have floated to within twenty-five feet of Macomber. In fact, the probability, in view of the wind's blowing broadside to the tug, the wake that the tug would make, the suction caused by the churn of the wheel, is that the life preserver would have floated much farther away than shallow water was from Macomber.

And finally, before closing, we wish to call the attention of the Court to the fact that the majority opinion of the court lays great stress upon the testimony of Smith, Edgecombe and Wuertz taken before the United States Local Inspectors on February 11, 1939. The record says that the jury could disbelieve the witnesses, although not impeached during the actual trial, on the basis of statements they made before the said United States Local Inspectors. The record will show conclusively that the lower court excluded this evidence upon proper objection, on the basis of the case of *Fegan* v. *Lykes Bros. S. S. Co.*, 199 So. 635, 196 La. 450, and that at no time did the attorney for the plaintiff in either of the appellate courts argue that the exclusion was improper. The court, however, for some reason, proceeded to discuss this testimony and use it in reaching its decision as if it were in the record. There can be no doubt that this is a material error of law, as the testimony taken before the United States Local Inspectors is purely hearsay and cannot be used except for the purpose of impeaching witnesses by asking them if they had not made prior inconsistent statements. This testimony would have never been considered if the case had been tried in a United States District Court, and it was a violation of the laws of evidence to consider this without passing on the submissibility, and is ground for a reversal by itself.

It is respectfully submitted that the opinion of the Court of Appeals for the Parish of Orleans is correct and that the opinion of the Louisiana Supreme Court should be

set aside. Otherwise, recovery will be had in the Louisiana courts, where there would have been a directed verdict as a matter of law in a Federal court, in favor of the defendant. It is respectfully submitted that the Supreme Court of Louisiana has enunciated a doctrine of law which, as a matter of fact, does away with the requirement that the plaintiff must prove negligence and that the negligence was the proximate cause of the accident, in order to recover under the Employers' Liability Act and the Jones Act.

Respectfully submitted,

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